International Brotherhood of Electrical Workers; Local Union No. 11 of the International Brotherhood of Electrical Workers *and* Bergelectric Corp. Case 31-CB-4858

29 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 23 September 1983 Administrative Law Judge Timothy D. Nelson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Electrical Workers IBEW Local 11 (Respondent Local or the Local) and Electrical Workers (Respondent International or the International) each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified.

1. The judge found that the Local violated Section 8(b)(1)(B) of the Act by fining supervisor-members Curt Alexen Jr. and Luther Noble for failing to perform picketing assignments, to the extent that the Local imposed the fines for their failure to picket on days they were scheduled to work. He found the fines lawful, however, to the extent that the Local imposed them for the supervisors' failure to picket on days they were not scheduled to work, and he left to compliance proceedings the determination of what portions of the fines are lawful. The judge additionally found that the Local violated Section 8(b)(1)(B) of the Act by fining Noble for violating a rule against performing work for a company declared "in difficulty with the Union," based on his conclusion that the work in issue was supervisory.[1]

The General Counsel excepts to the judge's failure to find that the entire fines levied for failing to picket are unlawful. We agree.

Alexen is Bergelectric's project manager, and Noble is its general superintendent; no party disputes that they are supervisors as defined in Section 2(11) of the Act. Both are members of Respondent Local, which assigned them to picket duty in June 1981,[2] when it began a strike against the employer-members of the Los Angeles County Chapter of the National Electrical Contractors Association (NECA), including Bergelectric. The Local assigned them to picket on various weekdays, when they were scheduled to work, and on several weekend days, when they were not. They each informed the Local that they would not accept the picketing assignments because they were members of Bergelectric's management. Nonetheless, the Local preferred internal union charges against Noble and Alexen, conducted trials,[3] and found them guilty of failing to report for picket duty in violation of the Local's bylaws. The Local fined Noble $180 and Alexen $1000. They appealed these fines to the International unsuccessfully.

In *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 430 (1978), the Supreme Court stated, as follows:

> [I]n ruling upon a § 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike [the Board] may—indeed, it must—inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B).

The Court held unlawful a union's discipline of supervisor-members for crossing its picket line and working during a strike, reasoning:[4]

> [T]he employer could not be certain that a fined [supervisor] would willingly answer the employer's call to duty during a subsequent work stoppage, particularly if it occurred in the near future. For an employer in these circumstances to insure having satisfactory collective-bargaining and grievance-adjustment services would require a change in his representative.

Noble and Alexen worked during the 1981 strike, but the Local's sanctions would tend to encourage them to picket and to refrain from working during future work stoppages, thus depriving the Company of its chosen supervisors.[5] Section 8(b)(1)(B) of the Act, as interpreted in *American Broadcasting Cos.*, prohibits union disciplinary actions tending to have such an effect. We conclude therefore that the fines were unlawful.

[1] No party excepts to this finding.

[2] All dates are in 1981 unless specified otherwise.

[3] Noble attended his trial, but Alexen did not attend his.

[4] Id. at 435.

[5] Noble's and Alexen's supervisory duties for Bergelectric include collective-bargaining and grievance-adjustment functions. Thus, Noble represents the Company at meetings with the Local's representatives or with individual employees involving pay disputes and jurisdictional disputes. Alexen also represents the Company in pay disputes. Moreover, the judge correctly found, pursuant to the Board's "reservoir" doctrine, that supervisory status alone is sufficient to invoke Sec. 8(b)(1)(B)'s protections, regardless of whether the particular supervisor normally is required to perform collective-bargaining or grievance-adjustment duties. *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982).

In the circumstances of this case, however, we need not decide whether a union violates the Act by disciplining supervisor-members for refusing assignments to picket their employers at times when they are not scheduled to work. Respondent Local assigned picket duty to Noble and Alexen without regard to their work schedules, and it fined them each a lump sum for failing to perform their assignments. These sums did not correspond to the number of times the supervisors failed to picket; Noble was fined $180 for failing to picket on 12 occasions, including 9 workdays, while Alexen was fined $1000 for failing to picket 4 times,[6] including 3 workdays. The Local's trial board found them guilty of "failing to report for picket duty" and, as the judge noted, "the Local simply did not discriminate" between times Noble and Alexen were scheduled to work and times they were off duty.

As the Local failed to make any such distinction, the entire fines are unlawful. The gravamen of the violation is the Local's act of disciplining supervisor-members Noble and Alexen without regard to their work schedules, an act which tended to restrain or coerce Bergelectric in selecting its collective-bargaining or grievance-handling representatives.

2. The judge absolved the International of liability for the violations. He found that the International did not independently violate the Act. The judge reasoned that the International merely processed the supervisor-members' appeals, a ministerial function, and passed on the issues brought before it, a judicial function. The judge further concluded that, because the International did not itself discipline Noble and Alexen or give the Local a right which it did not already possess to do so, the International was not responsible for the violations.

The General Counsel excepts, contending that the International's approval of the Local's actions renders it liable. We agree.

Pursuant to the procedure the International's constitution sets forth, Noble and Alexen appealed the Local trial board's disciplinary actions to the International's vice president, S. R. McCann, by letters dated 31 July and 21 December. They both contended that their supervisory responsibilities precluded them from picketing. Alexen stated, as follows:

> I have held the position of Project Manager for four years with the expectancy and assurances that it is a permanent position. Project Managers are in the highest level of supervision in the management hierarchy of Bergelectric Corporation.

Noble asserted, as follows:

> As General Field Superintendent for the firm which employs me, I have responsibility for all field operations for two offices covering three jurisdictions; the overall supervision of employees including the adjustment of grievances [sic] and disputes, material and equipment, including completed projects and final inspections.

Regarding his fine for working for a company "declared in difficulty with the union" Noble stated, as follows:

> On the date of my alleged violation, I was acting in my capacity as General Field Superintendent in a reinspection of a completed project in the company of a City Inspector.

On 4 June 1982 McCann sent essentially identical letters to Noble and Alexen, stating, in pertinent part:

> This has been an extremely difficult appeal and required an inordinate amount of time conducting investigations. From the investigations my decision is as follows.
>
> The decision of the Local Union 11 Trial Board is sustained, thereby, denying your appeal.

By letters dated 17 June 1982, Noble and Alexen individually appealed to Charles H. Pillard, the International's president, reiterating their prior assertions and questioning the fairness of the Local's disciplinary procedures. Pillard denied the appeals 10 November 1982.[7]

In *Iron Workers Local 46 (Cement League)*, 259 NLRB 70, 77 (1981), the Board found an international liable for upholding on appeal a local union's unlawful suspension of three foremen-members in the following words:[8] "[B]y the International's

[6] The record does not clearly indicate the reasons for this discrepancy, but the judge plausibly suggests it may have resulted from Alexen's failure to appear at his trial or because of the Local's additional $1000 fine against Noble for performing supervisory work.

[7] Pillard's letters to Noble and Alexen stated:

> As to your appeal to me from the International Vice President's decision, I wish to advise that I have made a careful review of the complete record before me and I find the charges to be of a most serious nature. I have given consideration to your defense that you consider yourself to be in management and therefore not subject to charges.
>
> The record before me is clear that your employer pays on all fringes which are contained in the Collective-Bargaining Agreement. Your pay scale on the report is at the journeymen rate consistent with the agreement. The record is bare of any evidence submitted by you or on your behalf which would show that you are a management representative for Bergelectric Corporation.

Both letters also stated that the applicants failed to appear at their trial board hearings. In fact, Noble attended one of his hearings.

[8] The international reduced the terms of the suspensions.

giving its imprimatur to the appropriateness of 'suspensions' as a disciplinary measure (albeit a reduced term), the acts and conduct of Local 46 *vis-a-vis* the suspensions are also chargeable to said International" The Board in turn relied on *Bricklayers (McCleskey Construction)*, 241 NLRB 898 (1979), in which a local fined a supervisor-member for working for an employer that did not have a contract with the local. At the local's request, the international expelled the supervisor-member when he failed to pay the fine. The Board found the fine and expulsion unlawful and held responsible both the local and the international, stating that the international had a duty to investigate the fine and that even the "slightest review" would have revealed its impropriety.

Noble and Alexen emphatically contended at every stage of the proceedings that they were supervisors and that Noble performed only supervisory work during the strike. The International did not simply "rubber-stamp" the trial board's finding; indeed Vice President McCann's letters stated that the appeals "had required an inordinate amount of time conducting investigations," and Pillard's letter stated he had "made a careful review of the complete record." Thus, the International investigated and reviewed the fines, then ratified the Local's action, although it had the opportunity and authority to reverse it. We perceive no real distinction between this case and *Cement League* and *McCleskey Construction*, and we find that, because the International approved the Local's unlawful conduct, it shares its liability.[9]

CONCLUSIONS OF LAW

1. By charging, trying, and fining supervisor-members Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments without regard to their work schedules and by charging, trying, and fining Luther Noble for performing supervisory work Respondent Local has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

2. By ratifying Respondent Local's discipline of supervisor-members Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments, and by ratifying Respondent Local's discipline of Luther Noble for performing supervisory work, Respondent International has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent Local and Respondent International have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent Local having unlawfully disciplined Noble and Alexen, and Respondent International having ratified this unlawful discipline, we shall require them to remove from their files all references to the unlawful disciplinary actions and to notify Noble and Alexen that they have done so and that the discipline will not be used against them in any way. We shall also order the Respondents to rescind the unlawful fines and jointly and severally to make whole Noble and Alexen by refunding the amounts of the fines they paid, plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that

A. Respondent Local, Local Union No. 11 of the International Brotherhood of Electrical Workers, Los Angeles, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Charging, trying, and fining supervisor-members for failing to perform picketing assignments without regard to their work schedules or for performing supervisory work during a strike.

(b) In any like or related manner restraining or coercing Bergelectric Corp., or any other employer, in the selection of its representatives for the purposes of collective bargaining or grievance adjustment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary fines imposed on Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments, and on Luther Noble for performing supervisory work, and jointly with Respondent International and severally make whole Noble and Alexen by refunding the amount of the fines that they paid, plus interest.

(b) Remove from its files any references to the unlawful disciplinary actions and notify Noble and Alexen in writing that it has done so and that it

[9] In deciding that the International did not violate the Act, the judge relied on the Board and court opinions in *Musicians (Don Glasser)*, 165 NLRB 798 (1967), enfd. sub nom. *Don Glasser v. NLRB*, 395 F.2d 401 (2d Cir. 1968). In that case the international processed and upheld two members' appeals of unlawful union fines, and the Board found that the international did not violate Sec. 8(b)(2) and (1)(A) of the Act merely by processing the appeals. *Glasser*, however, involved different sections of the Act and is distinguishable from this case; the Board's specific holding was that the international's ministerial action was not a union's affirmative "attempt to cause" employers to discriminate against nonmember employees. Furthermore, the international in *Glasser* sustained the appeals while in this case the International denied them, placing its imprimatur on the Local's misconduct.

will not use the disciplinary fines against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of its liability under the terms of this Order.

(d) Post at its meeting halls, offices, and hiring halls in Los Angeles, California, copies of the attached notice marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent Local's authorized representative, shall be posted by the Respondent Local immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Local to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Bergelectric Corp., if willing, at all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent Local has taken to comply.

B. Respondent International, International Brotherhood of Electrical Workers, Washington, D.C., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Ratifying Local 11's discipline of supervisor-members for failing to perform picketing assignments without regard to their work schedules, or for performing supervisory work during a strike.

(b) In any like or related manner restraining or coercing Bergelectric Corp. or any other employer, in the selection of its representatives for the purposes of collective bargaining or grievance adjustment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the disciplinary fines imposed on Luther Noble and Curt Alexen Jr. for failing to perform picketing assigments, and on Luther Noble for performing supervisory work, and jointly with Respondent Local and severally make whole Noble and Alexen by refunding the amounts of the fines they paid, plus interest.

(b) Remove from its files any references to the unlawful disciplinary actions and notify Noble and Alexen in writing that it has done so and that it will not use the disciplinary fines against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of its liability under the terms of this Order.

(d) Post at its offices in Washington, D.C., copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent International's authorized representative, shall be posted by the Respondent International immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent International to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Bergelectric Corp., if willing, at all places where notices to employees are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent International has taken to comply.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[11] See fn. 10, above.

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT charge, try, and fine our supervisor-members for failing to perform picketing assignments without regard to their work schedules or for performing supervisory work during a strike.

WE WILL NOT in any like or related manner restrain or coerce Bergelectric Corp., or any other employer, in the selection of its representatives for the purposes of collective bargaining or grievance adjustment.

WE WILL rescind the disciplinary fines we imposed on Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments and on Luther Noble for performing supervisory work and WE WILL jointly with the International and several-

ly make whole Noble and Alexen by refunding the amounts of the fines that they paid, plus interest.

WE WILL remove from our files any references to the unlawful disciplinary actions, and WE WILL notify Luther Noble and Curt Alexen Jr. in writing that we have done so and that we will not use the disciplinary actions against them in any way.

LOCAL UNION NO. 11 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT ratify Local 11's discipline of supervisor-members for failing to perform picketing assignments without regard to their work schedules or for performing supervisory work during a strike.

WE WILL NOT in any like or related manner restrain or coerce Bergelectric Corp., or any other employer, in the selection of its representatives for the purposes of collective bargaining or grievance adjustment.

WE WILL rescind the disciplinary fines we imposed on Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments, and on Luther Noble for performing supervisory work and WE WILL jointly with Local 11 and severally make whole Noble and Alexen by refunding the amounts of the fines that they paid, plus interest.

WE WILL remove from our files any references to the unlawful disciplinary actions, and WE WILL notify Luther Noble and Curt Alexen Jr. in writing that we have done so and that we will not use the disciplinary fines against them in any way.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. This unfair labor practice case arose when Bergelectric Corp. (Company) filed charges on December 1, 1982, against Respondents International Brotherhood of Electrical Workers and Local Union No. 11, affiliated with the same parent body (collectively, Respondents; respectively, International and Local). The charges were investigated under the supervision of the Regional Director for Region 31 of the National Labor Relations Board (Board). On January 21, 1983, the Director issued a complaint against the International and the Local alleging violations of the Act.

The main thrust of the complaint is that Respondents violated Section 8(b)(1)(B) of the National Labor Relations Act (Act) by the Local's act of imposing, and the International's act of sustaining, internal disciplinary fines against two of the Company's supervisory representatives, Luther Noble and Curt Alexen Jr., thereby "restraining and coercing [the Company] in the selection and retention of its representatives for the purposes of collective bargaining of the adjustment of grievances."[1]

Respondents duly answered, putting key substantive allegations into issue, and I heard the matter in trial at Los Angeles, California, on May 24, 1983. The General Counsel called two witnesses, Noble and Alexen. Respondents rested after certain exhibits and stipulations of fact were received. Timely and helpful post-trial briefs were filed by each party.

The Issues

Trial developments, including amendments to the pleadings and the entry into stipulations of fact by the parties, leave no important facts in dispute.

The central issue is whether Section 8(b)(1)(B) was violated when the Local admittedly fined its members Noble and Alexen (both of whom, Respondents now concede, are supervisors within the meaning of the Act)[2] for failing to perform picket assignments during a strike called against certain employers including the Company. In the individual case of Noble, the question is additionally raised whether another fine levied against him by the Local, ostensibly for Noble's doing "work" during the strike, violates Section 8(b)(1)(B).

Also before me for resolution are Respondents' common defensive contentions that Noble and Alexen were not, in fact, "collective bargaining representatives" or "grievance handlers" for the Company within the meaning of Section 8(b)(1)(B); and, in any case that the Company is estopped from charging a violation where it has followed a practice of treating Noble and Alexen as nonsupervisory bargaining unit personnel for purposes of periodic contribrutions and associated reports it makes to certain employee benefit trust funds.

In addition, the International contends that its involvement in this case is limited to a denial of appeals by Noble and Alexen from discipline imposed on them by the Local and, therefore, that the International committed no violation of Section 8(b)(1)(B).

On the foregoing, and noting at the outset that I found the testimony of the General Counsel's two witnessses to be sincere and credible, I make these

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[1] The quoted portion of the complaint closely paraphrases key language in Sec. 8(b)(1)(B) of the Act.

[2] On brief (p. 5) Respondents' counsel states regarding Noble and Alexen that "Respondents do not dispute either member's status as a Section 2(11) supervisor. . . ."

FINDINGS OF FACT

A. *Background*

The Company is a Los Angeles-based electrical contractor[3] which, with other members of the local chapter of the National Electrical Contractors Association, underwent an economic strike called by the Local in the summer of 1981.[4] Curt Alexen Jr. is the Company's project manager, and Luther Noble is its general superintendent. Each possesses and exercises one or more of the powers or attributes associated with "supervisory" status as that term is defined in Section 2(11) of the Act. They each perform different functions which have in common that each man must spend at least 50 percent of his time in the field, on the Company's construction jobsites.[5] They are each members of the Local and have been for many years.

B. *The Fines for Picketing No-Shows*

Both Alexen and Noble received picket duty assignment schedules from the Local in early June and each made contact with a functionary or official of the Local shortly after that to advise that he would not be able to picket during the strike.[6]

The Local sent letters to both Alexen and Noble shortly after they had failed to report for the picket duty which had been assigned to them. The letters advised them to appear at a stated time before a committee of the Local and contained a warning that charges could be filed against them. Alexen and Noble promptly replied in writing, each signing in the name of "Bergelectric Corporation," each contending in a general way that his current duties stood as an obstacle to his performance of picket duty.[7]

Internal union charges were nevertheless subsequently instituted against both Noble and Alexen for failing to perform assigned picket duty. In due course thereafter, the Local informed them that trial proceedings would be conducted on those charges and invited them to appear to present evidence and arguments.

Alexen did not attend the trial proceeding. Noble attended his separately scheduled trial on October 26. One of the members of the trial board, Robert Stanford, had been an employee working under Noble's supervision during an earlier period and Noble had been directly responsible for his discharge. Noble limited his defense to the statement that he "was in supervision and therefore . . . had chosen to remain neutral as far as union activities. . . ." Later, by letter to the Local dated November 18 (at a time when the trial board was still investigating and had not reached a decision), Noble wrote that his "responsibility as General Superintendent" at the Company was the reason he had not reported for scheduled picket duty, explaining further that his "duties require me to oversee projects in both Orange and Ventura County." He also set forth in some detail what specific tasks or functions he had actually performed on 9 of the 12 dates for which he was formally charged for failing to picket.

In each case, the Local later notified Alexen and Noble that he had been found guilty as charged by the Local's trial board and that a fine was being levied against him, roughly half of which was to be "held in abeyance," pending the fulfillment of certain conditions.[8]

C. *The Fine Against Noble for Work Done on June 15*

In addition, a separate internal charge was filed against Noble in June for a violation characterized by the charging individual as "Working on job" in violation of a specified provision within the International constitution.[9]

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[3] The Company is a California corporation which annually purchases and receives more than $50,000 in goods or services directly from suppliers outside the State of California.

[4] All dates below are in 1981, unless otherwise specified.

[5] In the light of Respondents' concession that Alexen and Nobel are statutory supervisors and my disposition below, the duties of those agents of the Company need only be summarized.

As general superintendent, Noble is salaried. He spends a substantial portion of his time overseeing the hiring and firing of electricians for the Company's projects. This involves consultation with lower-level crew foremen and supervisors and, when additional help is needed, Noble is the company representative who normally makes contact with one of the five district offices of the Local which serve as employee referral sources. In addition, Noble oversees all payroll and related reports and is the company official responsible for meeting with individual employees or with their representatives from the Local to resolve disputes about alleged pay discrepancies. He has also represented the Company in meeting from time to time with various representatives of the Local over such matters as jurisdictional disputes between and among the various crafts working on the Company's construction jobs.

As project manager, Alexen is salaried. He is principally responsible for supervising scheduling and coordination of construction and approving related purchase orders. His involvement in personnel or labor relations matters is limited to the approval of recommendations from lower levels of supervision that an employee or group of employees be laid off or terminated. Like Noble, he may become involved in pay disputes and has the power, after review of pertinent records, to authorize adjustments in pay.

[6] In Alexen's case, he telephoned Ralph Norrington, described by Alexen as a business agent for the Local's "District 1," and stated that he could not do picket duty because he was "management." In Noble's case, he called a person whose name he did not recall on the "Excuse Committee" for "Unit 4" (the same entity as the "District 4" referred to in G.C. Exh. 2, a printed picket schedule), but he did not then specify any reason for declining the assignment.

[7] Noble wrote on June 22 that he had "not been performing work covered by the . . . agreement since 1964, therefore I have chosen to remain neutral in all union activity. My duties here at Bergelectric Corporation also require me to oversee projects both in Orange County as well Ventura County."

Alexen wrote on June 19 that he had been "a project manager for four . . . years. At present I am involved in many large projects in Orange County and Los Angeles County on a full time basis." He followed that with a letter on July 7 to the Local which stated: "As a member of management . . . I have been advised . . . that I cannot be management one day and picket myself the next day."

[8] The "full" fine imposed against Noble was $180; that against Alexen was $1000, even though Alexen had been formally charged with only 4 picketing no-shows and Noble with 12. Standing alone, this may suggest that Alexen received more severe punishment because of his failure to appear at his trial (a provision within the Local's bylaws made it a separate offense not to appear when officially requested to do so, although this was not specifically referred to in the Local's notification to Alexen of the disciplinary decision). On the other hand, the seeming discrepancy in the fines may be related to the fact that, by the time Noble was disciplined for picketing no-shows, he had already been found guilty of separate charges for working during the strike (as is set forth below) and had been fined $1000 for that alleged offense, after failing to apear personally before the Local's trial board.

[9] The constitution makes it a punishable offense in the section invoked against Noble for a member to be "Working for any individual or company declared to be in difficulty with a L.U. or the I.B.E.W. in accordance with this Constitution."

This arose out of an incident on June 15 when a member of the Local, Sam Vukanovich,[10] saw Noble open a hinged electrical service panel cover on one of the Company's construction sites by manually removing two wing nut fasteners so that a building inspector could perform a required inspection of the installation before it was activated. Noble did not respond to this charge nor did he appear at the scheduled July 9 trial conducted by the Local. He was subsequently found guilty of the charged offense by the Local and a separate fine was levied against him.

Both Alexen and Noble filed written appeals to the International over the Local's disciplinary actions against them. In connection with those appeals, each of them submitted further written statements and arguments which are unnecessary to detail. It suffices to characterize their correspondence on appeal from the Local's discipline for the picketing no-shows as being centrally linked to the argument that they were each part of the Company's "management" team and, therefore, that they could not participate in picketing activity.

As to the separate discipline against Noble arising out of his having been involved on June 15 in the opening of a service panel cover, Noble stressed on appeal that in doing this, he had been "acting in my capacity as a General Field Superintendent in the reinspection of a completed project in the company of a City Inspector."

The International denied all appeals.[11]

I reserve any additional findings to the analysis in the next section.

Analysis

A. *General Principles*

As noted above, Section 8(b)(1)(B) bans union restraint and coercion of "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." It is now established that those bargaining and grievance-handling functions, sometimes called by the Board for shorthand purposes "8(b)(1)(B) duties," need not literally be part of a company representative's assigned or actual responsibilities in order for 8(b)(1)(B) protections to come into play. Rather, a company representative's supervisory status is alone sufficient to insulate him from union pressure otherwise proscribed by Section 8(b)(1)(B) without regard to whether or not the supervisor is normally expected to perform 8(b)(1)(B) duties. *Teamsters Local 296 (Northwest Publications)*, 263 NLRB 778, 779 fn. 6 (1982). The theory underlying that view is that a supervisor is a "reservoir" to be drawn on if need be to perform such duties. Ibid.

Respondents argue vigorously that the reservoir doctrine is unsound and should not be applied here. But Respondents concede and I have found that both Alexen and Noble are statutory supervisors for the Company. In the light of the Board's reaffirmance of the reservoir doctrine in *Northwest Publications*, supra, I need not and do not decide whether either Alexen or Noble actually possessed or exercised 8(b)(1)(B) duties and authority. The only question is whether, under the particular circumstances, the disciplinary action taken against them may properly be viewed as unlawful "restraint" or "coercion" within the meaning of Section 8(b)(1)(B).[12]

The Board restated generally applicable principles of 8(b)(1)(B) law in *Plumbers Local 364 (West Coast Contractors)*, 254 NLRB 1123 (1981). There the Board stated (at 1125):

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely effect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies v. Writers Guild of America, West, Inc.*, 437 U.S. 411 (1978); *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1965), enfd. 454 F.2d 1116 (10th Cir. 1972); and *Wisconsin River Valley District Council of Carpenters (Skippy Enterprises, Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (7th Cir. 1976).
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> It is also well settled that union discipline of supervisor members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B).[13] In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies supra* at 433–437, fn. 36; *N.L.R.B.* v. *International Union of Operating Engineers, Local Union No. 501*, 580 F.2d 359, 360 (9th

[10] Vukanovich has served in the past for the Local as a "business administrator" and, in that capacity, had dealt with Noble on matters relating to the Company's hiring needs.

[11] In Noble's case, the November 10, 1982, letter by which the International denied his appeals correctly observes that two separate violations by Noble are involved, but appears also to reflect confusion as to what precisely had taken place at the local level. This does not affect any question of substance in this case.

[12] This decision might be truncated by noting here that Respondents' concession as to the supervisory status of Noble and Alexen is accompanied by the further concession (Br., p. 5) that "a holding that the 'reservoir doctrine' applies leads to the inescapable legal conclusion that the fines are unlawful." The temptation merely to note this concession and to bring this decision to a close is a strong one, but, in my view, it would be unfair and injudicious to do so, since a judge is never bound to embrace legal conclusions suggested by counsel which would not be supported by a fair application of the law to the facts. As I discuss below, there are wrinkles to this case which cannot be ignored except at the expense of contributing to legal confusion. Moreover, in the light of other defensive contentions raised by Respondents, it is not as obvious as it might at first seem that Respondents would stipulate to the entry of judgment against them if they were to lose on their argument that the reservoir doctrine is unsound and should not be applied.

[13] *Florida Power & Light Co. v. Electrical Workers IBEW Local 641*, 417 U.S. 790 (1974), holding that Sec. 8(b)(1)(B) is not violated when a union disciplines supervisor/members for performing rank-and-file work, as distinguished from "normal supervisory functions," during a strike.

Cir. 1978); *A. S. Horner*, supra, 502; and *Skippy Enterprises, supra*, 218 NLRB 1064, enfd. 532 F.2d at 52–53. Such discipline is unlawful even where as here the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and, hence, will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies*, supra, 433–437.

B. *Legality of Fines for Picketing No-Shows*

I take first the cases of the fines against Noble and Alexen for failing to report for picket duty. Facially, at least, these were not directed against those supervisors' choices to continue performing their "normal supervisory functions" during the strike and, to that extent, such discipline does not clearly fall within the precedents.[14] I would nevertheless have little difficulty in concluding that the Local's discipline directed against the two supervisors for failing to participate in picketing of the Company during times when they were otherwise scheduled to work would be little more than an indirect means of accomplishing what the Local plainly could not have sought to do by direct means, i.e., to use internal discipline to discourage the Company's supervisors from working as supervisors during the strike. Thus, to the extent that the picket duty defaults for which Noble and Alexen were fined occurred on dates when they were scheduled to work for the Company, the fines would appear to violate Section 8(b)(1)(B).

By parity of reasoning, however, it must be observed that Section 8(b)(1)(B) is not obviously implicated by a union fine levied against a supervisor/member for failing to perform assigned picket duty which does not actually conflict with the supervisor's work schedule. Put another way, given the policies and underlying purposes which Section 8(b)(1)(B) was designed to serve as summarized above in *West Coast Contractors*, it is difficult to envision how that latter kind of a disciplinary fine could tend to "depriv[e] the employer of the grievance adjustment services of his chosen representative."[15]

Having so concluded, it becomes pertinent to observe that this record does not clearly show that the fines against Noble and Alexen were linked solely—or even at all—to picketing no-shows on days when the supervisors were scheduled to work for the Company. Indeed, close study of the record reveals in each case that at least some of the no-show incidents relied upon by the Local took place on Saturdays.[16] This poses interesting problems, for the authorities cited earlier necessarily imply that it is part of the prosecutor's prima facie burden to show that a union's disciplinary action against a supervisor/member somehow impaired the employer's right to the services of his chosen 8(b)(1)(B) representative.[17] And it is at least arguable that such a burden is not carried simply by showing that Noble and Alexen were fined for not picketing on a variety of days which included Saturdays.[18] But in the absence of any defensive contention that the Local's discipline was confined to instances where Noble and Alexen failed to show up for picket duty which did not conflict with their regular supervisory work schedules, I conclude that the Local simply did not discriminate between those instances and instances where Noble's and Alexen's work and picketing schedules were in conflict. And I thus do not find it fatal to the General Counsel's prima facie case that it was not shown in *all* instances that the Local's picketing schedules conflicted with Noble's and Alexen's normal work schedules. Rather, as is discussed below in the Remedy section, these concerns have significance, if at

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[14] In *Plumbers Local 195 (Jefferson Chemical)*, 237 NLRB 1099 (1978), the Board adopted the recommendation of the administrative law judge and dismissed an 8(b)(1)(B) complaint grounded on the union's imposition of a fine against an alleged supervisor, Riley, for failing to perform picket duty. The dismissal was based on a finding that Riley was not a supervisor within the meaning of the Act. Accordingly, the Board did not reach the question whether such a fine against a supervisor would violate Sec. 8(b)(1)(B).

[15] Without acknowledging the distinctions now under discussion, the General Counsel argues on brief, inter alia, that fines against supervisors for failing to pull picket duty are violative because they "may cause them [i.e., supervisors] to actively engage in picketing in the future against the employer" (G.C. Br., p. 15). But this prospect, however potentially embarrassing or irritating to the employer, cannot be said to impair the employer's ability to use the 8(b)(1)(B) services of his supervisors so long as the picketing does not occur during times which conflict with the supervisor's work schedule for his employer. And it must be recalled further that an employer who finds it offensive to have his striking employees joined occasionally on the picket line by a member of his management team may simply require the supervisor to relinquish his union membership and to refrain from picketing. *Florida Power & Light*, supra, 417 U.S. at 813. This will effectively remove any possibility of a "conflict of loyalties" on the supervisor's part. And it is for this reason that the *Florida Power* Court rejected the Board's arguments linked to concerns about supervisory "loyalties" in general and held that Sec. 8(b)(1)(B) was not intended by Congress to be "any part of the solution to the generalized problem of supervisor-member conflict of loyalties." Ibid.

[16] In Alexen's case, he was fined for picketing no-shows on Saturday, June 13, as well as for additional no-shows on subsequent weekdays, June 23, July 2, and July 13. In Noble's case, he was fined for no-shows on Saturdays, June 20 and 27 and July 18, as well as for 9 additional weekday no-shows.

[17] E.g., *Florida Power & Light*, supra, 417 U.S. at 804–805, where the Court stated:

> Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargaining representative on behalf of the employer.

[18] I would further infer from this record that Saturday was not normally a scheduled workday—at least for the Company's rank-and-file employees. I draw this inference from Noble's testimony that in the first 9 months of 1981 it was especially difficult to retain employees because *other* employers were "working Saturdays and Sundays which is at a higher or double-time rate, so electricians were continually job hopping at that time." And, it ought to be added, the same testimony (as well as the kind of "common knowledge" of which I may properly take notice) justifies the finding that Mondays through Fridays were normally scheduled workdays for the Company's electricians.

all, in determining the extent to which the Local must reimburse Noble and Alexen for the amounts they have paid to date to the Local as disciplinary fines.

C. *Legality of Noble's Fine for Working on June 15*

At the outset, I note that the fine against Noble growing out of Vukanovich's charge does not expressly attack Noble's activity as a prohibited performance of rank-and-file struck work. Rather, the underlying charge facially attacks the mere fact that Noble was "working" for the Company on the day in question. I nevertheless infer that the real charge was, implicitly, that Noble was performing nonsupervisory or "struck" work when he manually removed 2 wing nuts so that a city inspector could open a service panel. For, if the charge was intended to attack Noble's having merely "worked" for the Company on June 15, one might wonder why similar charges were not filed against him on every day that he performed more customary supervisory functions for the Company during the strike. The General Counsel proceeds from the same factual assumption[19] and I deal no further with that distraction.

Treating the Local's action against Noble as, in effect, discipline for allegedly performing struck unit work nevertheless does not affect my judgment that such discipline was unlawful. If I were required to judge whether, in fact, the work Noble did in connection with the inspection was rank-and-file unit work, I would rely on Noble's undisputed testimony that, when a panel plate is opened by a supervisor for purposes of an official inspection, that is a task traditionally performed by supervisory officials,[20] but when done in the course of installation of the service, it is normally done by unit electricians. Moreover, even if that tiny increment of work done by Noble were properly characterizable as "unit" work, I would find it to have been so closely connected to Noble's performance of his official supervisory duties that a fine levied against him for performing it would necessarily impair his ability to perform supervisory services for the Company, thus violating Section 8(b)(1)(B).[21]

D. *Respondents' Estoppel Defense*

The parties stipulated and I find that from April 1982 to March 1983, the Company funished reports and payments to a benefit trust which is the creature of the pertinent labor agreement in which Noble and Alexen were included and their earnings were set forth as if they were hourly paid journeyman electricians. Respondents argue that the Company (and Noble and Alexen) are thereby estopped in this proceeding from asserting that Section 8(b)(1)(B) was implicated by the complained-of disciplinary conduct. This defense may be disposed of summarily.

The elements of estoppel, at least as the Board recognizes them, are "(1) lack of knowledge and the means to obtain knowledge . . . (2) good-faith reliance upon the misleading conduct of the party to be estopped; and (3) detriment or prejudice from such reliance." *Oakland Press Co.*, 266 NLRB 107–108 (1983).[22] Here, there are ample facts found above to justify the conclusion that important actors in the Local at least knew at all material times that Noble and Alexen were supervisory representatives of the Company. And especially where the stipulation relied on by Respondents encompasses a period of time after the complained-of action by the Local had occurred and relates only to possible inferences which might be drawn from the Company's report to a third party entity (a benefit trust), it is impossible to conclude either that Respondents were, in fact, misled about the status of Noble or Alexen, or that they were without the means to obtain that knowledge, or that they acted in detrimental reliance upon such inferences as might be gleaned from the trust reports.

E. *The Question of the International's Liability*

Without citing authorities, the International claims in substance that its mere denial of internal appeals from "affirmative action" taken by the Local does not establish a violation of the Act. In these peculiar circumstances, where the record shows that it was the Local which imposed the fines against Noble and Alexen and the International's only role was in the processing of appeals which were filed in accordance with the International's constitution, I agree that the International shares no liability. For the International's role involved a combination of ministerial and judicial functions limited solely to review of the contentions made by the parties on appeal and a comparison of those contentions with the record, if any, made by appellants Noble and Alexen at the trial board level.[23]

The features noted above persuade me that the International's role in this case is not materially distinguishable from that played by the union international body in *Musicians (Don Glasser)*, 165 NLRB 798, 800–801 (1967),

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[19] G.C. br., p. 13, fn. 10.

[20] More precisely, the burden of Noble's testimony here is that supervisory officials do not normally become involved in routine inspections, but where as here the initial inspection results are contested by the Company and a reinspection is being conducted at the Company's request, a management official will normally become involved during the reinspection process.

[21] As Respondents concede on brief (p. 4), for union discipline of a supervisor/member for performing struck unit work to pass legal muster under Sec. 8(b)(1)(B), the unit work performed must have been more than "minimal." *Columbia Typographical Union 101 (Washington Post)*, 242 NLRB 1079, 1080–1081 (1979). Noble's alleged "unit" work here was, at best, minimal.

[22] It must also be observed that the Board did not, in the cited case, indicate any disposition to apply equitable principles of estoppel where to do so would contravene the paramount commands of the Act. Ibid.

[23] In denying both appeals, the International's president stated:

> The record is bare of any evidence submitted by you or on your behalf which would show that you are a management representative of Bergelectric Corporation.
>
> It would appear elementary to me that you would have attended the trial board hearing at which time you would have been afforded the opportunity of presenting your position on the charges, and then meet the case of your accusor by evidence or argument. This you failed to do.

Although it was not true, in the case of the picketing no-show discipline against Noble, that he had failed to appear at the trial convenced to hear the charge, this seems without significance when, by Noble's admission, his only statement at the time was the conclusionary "position" which he took that he was "in supervision and therefore . . . had chosen to remain neutral as far as union activities."

affd. in pertinent part sub nom. *Don Glasser v. NLRB*, 395 F.2d 401 (2d Cir. 1968). There, the Board rejected the contention that the Federation (the international body) violated Section 8(b)(2) of the Act by its "processing" of disciplinary charges against an employer-member pursuant to Federation bylaws. The Board adopted the reasoning that "the mere decisional act of processing and finding merit . . . in a charge does not constitute an 'attempt to cause' discrimination on the part of the decisional body." *Id.* at 801. In affirming the Board in this regard, the Second Circuit observed that:

> The processing of charges is no more than a series of ministerial steps taken in the office of the Secretary of the Federation in order to prepare the charges for decision by the Executive Board. Similarly, in its consideration of charges against members, the Executive Board, acting in a quasi-judicial capacity, merely passes on the issues brought before it for the purpose of determining whether the party charged is guilty of a bylaw violation. There is no Federation action directed at the employer until an attempt is made to enforce a fine or other penalty imposed pursuant to an Executive Board decision sustaining a charge.[24]

The General Counsel does not address on brief exactly what it is about the International's behavior in this case which should render it liable for having sat in a "quasi-judicial capacity" to hear the appeals of Noble and Alexen from disciplinary *action* taken against them by the Local. Neither does she contend that the International's function involved anything more than "pass[ing] on the issues brought before it for the purpose of determining whether the party charged is guilty of a bylaw violation." Indeed, unlike the "trial court" function of the Federation in the cases just cited, the International's role herein is more properly understood as that of an appellate body whose jurisdiction is not properly invoked until an appeal is filed by a party aggrieved by *action* taken at the Local level. The International's denial of Noble's and Alexen's appeals did nothing in the way of "imposition" of adverse action on those individuals, nor did it give the Local the right to take action against them which the Local did not already enjoy. To that extent, therefore, it would involve an even greater conceptual leap to conclude that the International's behavior in this case somehow had some independent tendency to restrain or coerce the Company in the selection of its 8(b)(1)(B) agents.

Accordingly, I would dismiss the complaint insofar as it challenges the International's conduct in denying Noble's and Alexen's appeal.

Upon the foregoing, I reach these ultimate

CONCLUSIONS OF LAW

1. Respondents are each labor organizations within the meaning of Section 2(5) of the Act.
2. The Board's jurisdiction is properly invoked in this case by virtue of the Local's actions taken against supervisory representatives of the Company, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. To the extent that the Local took internal disciplinary action against Luther Noble and Curt Alexen Jr. for failing to perform picketing assignments which conflicted with their normal supervisory work schedules, and by the Local's action in disciplining Luther Noble for performing supervisory work on June 15, 1981, the Local has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.
4. The International did not violate the Act by processing, hearing, and denying the appeals of Noble and Alexen from the unlawful discipline imposed upon them by the Local.

THE REMEDY

Having found that the Local violated the Act in certain respects, I shall recommend that it be ordered to cease and desist therefrom, that it post an appropriate remedial notice to members, and that it rescind and refund to Noble and Alexen those portions of the disciplinary fines which it levied against them in violation of Section 8(b)(1)(B),[25] with appropriate interest.[26]

[Recommended Order omitted from publication.]

[24] 395 F.2d at 404-405.

[25] Whether, and if so how much, the Local would have lawfully fined Nobel and Alexen for picketing no-shows on days when their picket assignments did not conflict with their supervisory work schedules is a matter for the compliance process.

[26] See *Florida Steel Corp.*, 231 NLRB 651 (1977).